AMAR KAUR RAM SINGH

v.

NAJAR SINGH SAGAR SINGH

HIGH COURT MALAYA, IPOH
ABDUL MALEK AHMAD J
[ORIGINATING SUMMONS NO. 24-506-89]
26 OCTOBER 1990

FAMILY LAW: *Custody - Paramount consideration of welfare of child - Rebuttable presumption that custody of child less than 7 years should be given to mother - Wishes of child - Disruption in change of custody s. 88 - Law Reform (Marriage and Divorce) Act 1976.*

As a result of problems between the parties, the marriage between the parties broke down in 1988. There were 6 children of the marriage who have been living with the defendant father. The plaintiff mother now seeks custody, care and control of the six children and for maintenance and child support. The children are aged 12, 10, 9, 7, 6 and 5.

Held:

[1] The law in relation to custody of a child is contained in s. 88 of the Law Reform (Marriage and Divorce) Act 1976 (the Act).

[2] Section 88(3) of the Act states that there is a rebuttable presumption that it is good for a child below the age of seven years to be with his mother; however the Court shall have regard to the undesirability of disturbing the life of a child by changes of custody.

[3] (a) On the facts of this case, the plaintiff had attempted suicide on a number of occasions and was prone to violent outbursts of temper; she had also spent time at the mental hospital.

(b) The Judge had interviewed all the six children and was impressed with their intelligence and eloquence; they expressed their wish to remain with their father.

(c) The welfare reports as to the social backgrounds of both parents indicate that the six children appear to get on well with their father and this has resulted in their present positive, physical mental and emotional state, notwithstanding that their mother had left them for two years.

(d) It is doubtful whether the mother can even look after herself properly.

(e) Any order for a change in custody would disrupt the present stable situation.

[Plaintiff's application dismissed.]

Cases referred to:

Yong May Inn v. Sia Kuan Seng [1971] 1 MLJ 280
Yap Chee Kong v. Chan Bee Yen [1989] 2 CLJ (Rep) 668
Manickam v. Intherahnee [1985] 1 MLJ 56
Kok Yoong Heong v. Choong Thean Sang [1976] 1 MLJ 292
Koh Teng Lam v. Elsie Koh Chen Chee & Anor. [1976] 1 MLJ 103
Mahabir Prasad v. Mahabir Prasad [1982] 1 MLJ 189
Wong Kwong Siong v. Ling Pik Ngiik [1972] 1 MLJ 116
Lee Soh Choo v. Tan Ket Huat [1986] CLJ (Rep) 440

Legislation referred to:
Law Reform (Marriage and Divorce) Act 1976, s. 88(2)

For the Plaintiff - Manjit Singh; M/s. Manjit Singh & Co.
For the Defendant - Choy Kam Lee; M/s. K.C. Lai & Co.

JUDGMENT

Abdul Malek Ahmad J:

The plaintiff had applied for the custody, care and control of her six children, aged 12, 10, 9, 7, 6 and 5 at the time of the application on 12 June 1989, who are staying with their father the defendant, for maintenance and child support amounting to RM800 per month, for such sum to be attached and paid to the plaintiff, and for costs in the cause.

The plaintiff and defendant had been married on 21 March 1976 and had cohabited at No. 7, Candy Lane, Ipoh and subsequently at No. 30, Jalan Timah, Eden Park, Ipoh. Ever since the marriage, the defendant's mother and sister had stayed with them at both the addresses and the plaintiff's contention is that the constant interferences and instigations of her in-laws had drastically damaged her matrimonial bliss. The culmination of her problems was an assault by them which led to her having to leave the matrimonial home on 28 June 1988. The plaintiff is now residing with her mother in Penang.

The defendant's version is that the plaintiff has a short and explosive temper and has grown to be a proud, argumentative, arrogant, impolite and difficult person with a low esteem of people like him from poor backgrounds. The plaintiff had also looked down on him and had ridiculed him for his handicap of having only one hand. The defendant, however, states that he is aware that the plaintiff's outbursts and violent behaviour are due to her mental state.

As for the incident leading to the plaintiff leaving the house, the defendant said he had found the plaintiff in a sullen and angry mood that morning. The defendant told her to have the breakfast already prepared by his mother but the plaintiff had instead become angry. When the defendant got into his car, the plaintiff had got into the front passenger seat and had begun shouting and hitting him with her fist. The defendant left the car to let matters cool down. When he got back into the house, he saw the plaintiff walking up and down the hall mumbling and shouting that she was going to kill everyone. The defendant got back into the car but as he was leaving, the plaintiff had thrown a knife at the car twice. Fearing for his life, the defendant had lodged a police report. When he got back to the house with the police, there was already a police car there as the plaintiff had slashed her wrists and had thrown a knife at her sister-in-law. The police had consequently taken the plaintiff to the Police Station, General Hospital and subsequently the Hospital Bahagia where she remained until 12 July 1988.

The defendant added that the plaintiff had a history of suicidal tendency. In 1978, she had poured kerosene on herself and had tried to put herself on fire but the defendant had stopped her. In 1986, she had taken dettol and potassium pomegranate and had been warded from 20 March to 2 April. She had again been warded from 13 August to 15 August 1987 for taking an overdose of sleeping pills. While in hospital, she had attempted to drink some poisonous liquid and to jump off the building.

Section 88(2) of the Law Reform (Marriage and Divorce) Act 1976 (hereinafter the Act) has made it clear that in deciding in whose custody a child should be placed, the paramount consideration shall be the welfare of the child. Subject to that, the Court shall have regard

to the wishes of the parents of the child and the child if he or she is of an age to express an independent opinion. Subsection (3) of that same section in the Act states that there shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother. However, whether that presumption applies to the facts of any particular case, the Court shall have regard to the undesirability of disturbing the life of a child by changes of custody.

In *Yong May Inn v. Sia Kuan Seng* [1971] 1 MLJ 280, the Court had awarded the mother, who had left the matrimonial home with one child after a dispute with her husband, custody of their three daughters aged 12, 10 and 8 years respectively. The dispute in that case is similar to the one here in that there has been interference from the husband's mother. In *Yap Chee Kong v. Chan Bee Yen* [1989] 2 CLJ (Rep) 668, custody of a child below 7 was given to the mother who had left the husband's parents' home as the Court found her to be the unimpeachable parent since her husband had failed to provide a matrimonial home.

In *Manickam v. Intherahnee* [1985] 1 MLJ 56, the Federal Court agreed with the High Court in that custody of the couple's elder child, who was staying with the father who had since remarried, should be given to the mother as the learned Judges held that the care and attention of the natural mother could reasonably be expected to be superior to that of a stepmother. The learned Judicial Commissioner had also not interviewed the 8 year old child, which was a ground of complaint, but the Federal Court's view was that they did not think that at that age and being in the custody of the father, he could reasonably be expected to express any independent opinion on his preferences.

In *Kok Yoong Heong v. Choong Thean Sang* [1976] 1 MLJ 292, the two children involved aged 2 and 3 had been given to the custody of the mother. Similarly, in *Koh Teng Lam v. Elsie Koh Chen & Anor.* [1976] 1 MLJ 103, the custody of a 5 year-old child was given to the mother. Again, in *Mahabir Prasad v. Mahabir Prasad* [1982] 1 MLJ 189, custody of two daughters aged 7 1/2 and 8 1/2 had been given to the mother.

None of these decisions, however, concerns a parent like the plaintiff in the present case who had attempted suicide on a number of occasions and who was prone to violent outbursts of temper. Police had to be called in on her last outburst and before she left the matrimonial house to stay with her mother in Penang, she had again been referred to the mental hospital. I had also interviewed all the six children concerned and must confess that I was impressed with their intelligence and eloquence despite their tender ages. They were forthright in their views and did not mince their words to state that they prefer to stay with their father.

I had also considered the welfare reports as to the social backgrounds of both the parents and am inclined to agree with the finding that the six children now with the father appear to get on well with him which have resulted in their present positive physical, mental and emotional state which was clearly noticeable when they appeared before me in chambers. Their mother had left them for two years now but their overall well being under their father who appeared to the Court to be a concerned and responsible parent, coupled with their good school reports, can only induce me not to disturb their lives by changes in custody by interfering with their present stable conditions considering the mental state of their mother and the personal views of the children themselves. I must also emphasis here that only one of the six children is below 7 for whom the Act has prescribed a rebuttable presumption that it is for the good of the child to be with the mother. As it stands, however, that presumption is rebuttable.

Despite the trend of cases where the custody of children of tender years is given to the mother, since the paramount consideration is the welfare of the children, the ability of the relevant parents to take care must merit attention. It is pertinent to refer to some authorities where the mother has not been given custody of young children, although the facts are not exactly on point, to illustrate that custody need not necessarily have to be given to the mother in every case. In *Wong Kwong Siong v. Ling Pik Ngiik* [1972] 1 MLJ 116, the mother was found to be suffering from chronic schizophrenia and was not able to look after the two young sons while in *Lee Soh Choo v. Tan Ket Huat* [1986] CLJ (Rep) 440, the Court observed that the mother in having to work to maintain herself was not in a position to devote her full attention to her two young children, who were living with the father, and as regards whom she was not decided as to whether to send them to her mother in Kedah or to her brother and his wife in Kuala Lumpur.

In the light of the facts of this case, I have my doubts that the mother can even look after herself properly. In addition, all the six children have expressed their desire to continue staying with their father who, in the last two years after the mother had left the matrimonial home, appears to have taken good care of them judging from their appearance and the school and probation reports. Any order for a change in custody would certainly disrupt the present stable situation.

In the event, I had dismissed the plaintiff's application but had ordered that each party bear their own costs. I had also granted reasonable access to the plaintiff on terms to be agreed between the parties.

Also found at [1991] 1 CLJ 294